

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative  
Penalty Order Issued to A-Abatement  
& Contracting, Inc.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

A hearing was held on June 4, 2009, at the Office of Administrative Hearings by Administrative Law Judge Beverly Jones Heydinger, pursuant to the Notice and Order for Hearing issued on April 28, 2009. The hearing record closed at the conclusion of the hearing.

Appearances: Gina D. Jensen, Assistant Attorney General, appeared on behalf of the Minnesota Department of Health (Department or MDH). Garry Thompson, owner, appeared on behalf of A-Abatement & Contracting, Inc. (Respondent).

**STATEMENT OF THE ISSUES**

1. Did the Respondent fail to submit notification to MDH of regulated asbestos-related work at Payne Avenue Free Evangelical Church (Church), in violation of Minn. Stat. § 326.74 and Minn. R. 4620.3410, subp. 1? <sup>1</sup>

2. Did the Respondent fail to pay the required permit fee for regulated asbestos-related work, in violation of Minn. Stat. § 326.75, subd. 3, and Minn. R. 4620.3430, subp. 2?

3. Did the Respondent fail to use certified asbestos workers and site supervisors to conduct regulated asbestos-related work, in violation of Minn. R. 4620.3250, item A?

4. Did the Respondent fail to have a sign in/out log identifying individuals conducting regulated asbestos-related work in the sanctuary of the Church, in violation of Minn. R. 4620.3440, subp. 1 A?

5. Did the Respondent fail to have a project plan for the regulated asbestos-related work at the Church, in violation of Minn. R. 4620.3440, subp. 1 B?

<sup>1</sup> Minnesota Statutes are cited to the 2008 edition; Minnesota Rules are cited to the 2007 edition.

6. Did the Respondent fail to install critical barriers in the work area prior to conducting regulated asbestos-related work, in violation of Minn. R. 4620.3567?

7. Did the Respondent fail to construct containment to isolate the work area from the rest of the building to prevent asbestos contamination of non-work areas, in violation of Minn. R. 4620.3568, subp. 1?

8. Did the Respondent fail to construct a decontamination unit for workers exiting the work area and to prevent contamination of areas outside the work area, in violation of Minn. R. 4620.3569, subp. 1?

9. Did the Respondent fail to have an operational HEPA-filtration system for the work area before conducting regulated asbestos-related work, in violation of Minn. R. 4620.3570, subp. 1?

10. Did the Respondent fail to wet the asbestos-containing floor tile before and during its removal from the Church, in violation of Minn. R. 4620.3571, subp. 1 A and B?

11. Did the Respondent fail to wrap the floor section in 6-mil polyethylene sheeting before removing the sections from the work area and stacking them in the back of Respondent's truck, in violation of Minn. R. 4620.3571, subp. 2 B?

12. Did the Respondent fail to conduct indoor air monitoring during regulated asbestos-related work, in violation of Minn. R. 4620.3592, subp. 2?

13. Did the Department properly and reasonably calculate the amount of the administrative penalty?

The Administrative Law Judge recommends that the Administrative Penalty Order (APO) issued to A-Abatement & Contracting, Inc. on February 12, 2009, be affirmed.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. Respondent is licensed by the Department to conduct asbestos-related work in Minnesota. Garry Thompson is the owner of Respondent and holds an asbestos-site supervisor certificate.<sup>2</sup>

2. On August 13, 2008, the Respondent submitted a bid to the Payne Avenue Free Evangelical Church (Church) to remove floor tile containing asbestos from the church, and to perform the work "according to all [Minnesota Pollution Control

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<sup>2</sup> Test. of Nancy Jo La Plante.

Agency] and MDH rules.”<sup>3</sup> The Church accepted the bid and the Respondent began work on August 14, 2008.<sup>4</sup>

3. Prior to seeking the bid, the Church had submitted the floor tile for testing and determined that it contained three percent asbestos.<sup>5</sup> “Asbestos-containing material” is material that contains more than one percent asbestos.<sup>6</sup>

4. “Asbestos-related work” includes “the enclosure, removal, or encapsulation of asbestos-containing material in a quantity that meets or exceeds ... 160 square feet of friable asbestos-containing material” on facility components other than pipes.<sup>7</sup> “Friable” material is brittle or readily crumbled.<sup>8</sup> “Asbestos-related work” includes “asbestos abatement area preparation; enclosure, removal, or encapsulation operations; and an air quality monitoring specified in rule to assure that the abatement and adjacent areas are not contaminated with asbestos fibers during the project and after completion.”<sup>9</sup>

5. In the afternoon of August 14, 2008, church pastor Larry Wilman and church member Mark Peabody became concerned that the Respondent’s employees were using electric saws to cut through floor tile that contained asbestos. Mr. Peabody called Mr. Thompson to notify him of their concerns.<sup>10</sup>

6. Mr. Peabody met with Mr. Thompson at approximately 7:00 a.m. on August 15, 2008, to discuss the way the job was being conducted. Mr. Thompson instructed the employees to stop work, but to remove the sections of floor that were already cut and take them to the truck outside. Mr. Thompson was upset and left the work site to “cool off.”<sup>11</sup>

7. Shortly thereafter, Mr. Wilman heard the electric saws running again. He contacted Mr. Peabody, told the workers to stop using the saws, and called Mr. Thompson. Mr. Peabody called the Department at approximately 8:00 a.m. on August 15 to notify it of his concern about the improper removal of the floor tiles.<sup>12</sup>

8. After receiving the call, Mr. Thompson contacted Angstrom Analytical to come to the Church to take air and dust samples.<sup>13</sup>

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<sup>3</sup> Ex. 7.

<sup>4</sup> Ex. 4; Test. of Garry Thompson.

<sup>5</sup> Test. of La Plante; Ex. 17. Exhibit 17 was a memo prepared in August, 2008, by Church member Mark Peabody, outlining the chronology of events concerning the asbestos tile removal at the Church. It was provided to MDH, but the author was not called as a witness by either party. Although it was admitted as a business record, it was relied upon only as corroboration of other evidence.

<sup>6</sup> Minn. Stat. § 326.71, subd. 3.

<sup>7</sup> Minn. Stat. § 326.71, subd. 4.

<sup>8</sup> Test. of La Plante; The American Heritage College Dictionary, 3<sup>rd</sup> Ed.

<sup>9</sup> Minn. Stat. § 326.71, subd. 4.

<sup>10</sup> Ex. 4; Test. of Thompson.

<sup>11</sup> Ex. 4; Test. of Thompson.

<sup>12</sup> Exs. 3, 4.

<sup>13</sup> Test. of Thompson.

9. At approximately 9:15 a.m., two investigators from the Department, Nancy Jo La Plante and Bruce Lange, arrived at the Church to investigate the complaint. Mr. Peabody told the investigators that he had called the Respondent the prior afternoon because workers were improperly using saws to cut through the floor tile, that he had met with the Respondent earlier that morning, that the Respondent had directed his employees to stop work but to remove the cut sections from the Church to Respondent's truck, and that the Respondent had then left the site. When Mr. Wilman heard the saws running again, Mr. Peabody had called the Department.<sup>14</sup>

10. By cutting through the floor tiles with electric saws, the Respondent made the asbestos tiles friable.<sup>15</sup>

11. The investigators donned protective equipment and entered the work area. They took photos of the room, the cut sections of flooring, debris on the floor, equipment and other items, and measured 10 sections of cut flooring in the work area. Based on the measurements, the investigators calculated that 136.5 square feet of asbestos-containing floor tiles had been cut, and there was 122 square feet of uncut floor tile.<sup>16</sup>

12. The investigators documented each photo, took eight samples of floor tile and debris, and noticed that the flooring sections had been cut with electric saws, that none of the flooring sections were wet, and that a HEPA air-filtering machine in the work area was not installed or operating. They also saw trash bags filled with dry debris from the floor, and observed that the work space was not contained, there was no decontamination unit, and that many movable items owned by the church were located in the work area. There was also some debris on the floor outside the work area.<sup>17</sup> There was no evidence that the indoor air was being monitored.<sup>18</sup>

13. The investigators spoke to Mr. Thompson who had returned to the Church during the investigation. He told the investigators that he had not been on the site when the employees had cut the floor tiles, but that he had shown the men the prior day how to remove rows of floor tiles so that the saw cuts could be made through the wooden underlayment and not through the floor tiles. Once he had learned that they had been cutting through the floor tiles, he had specifically directed them to stop the cutting. Mr. Thompson recalled the first names of two of the three employees, including one certified as a qualified site supervisor, but he could not recall any last names.<sup>19</sup> He had no certifications for any of the workers. Mr. Thompson stated that all three were employees of his brother, and he provided the investigators with his brother's cell phone number. He could not recall the name or address of his brother's company.<sup>20</sup>

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<sup>14</sup> Ex. 4; Test. of La Plante.

<sup>15</sup> Test. of La Plante; Ex. 5.

<sup>16</sup> Ex. 4; Ex. 5; Test. of La Plante.

<sup>17</sup> Ex. 4; Ex. 5; Test. of La Plante.

<sup>18</sup> Test. of La Plante.

<sup>19</sup> Ex. 4; Test. of La Plante; Test. of Thompson.

<sup>20</sup> Ex. 4; Test. of La Plante.

14. Mr. Thompson asserted that one of the employees was certified to supervise asbestos removal but he could not produce the certification. The investigators asked to inspect the floor sections that had been placed in the truck.<sup>21</sup>

15. The investigators determined that the doors to the work area should be sealed and closed, and the area posted to assure that persons without protective gear did not enter.<sup>22</sup>

16. At approximately 11:45 a.m., Steve Wallinga from Angstrom Analytical came to the Church and took air and dust samples from several areas adjoining the work area. No asbestos was detected in any of the samples.<sup>23</sup> Because the investigators had determined that the work area was contaminated, they would not allow Mr. Wallinga to take samples in the work area.<sup>24</sup>

17. Mr. Thompson left the Church to get a key to the truck and returned at approximately 1:00 p.m. The investigators observed at least 8 floor sections in the truck, none wet or wrapped. Mr. Thompson told the investigators that when he had learned that the sections had been cut with saws, he wanted them removed from the area and that he had intended to wrap the sections in the truck. The investigators directed Mr. Thompson to wet and wrap the sections before the truck was removed from the site, and he agreed to do so.<sup>25</sup>

18. The investigators gave the Church some information about cleaning the areas adjoining the work site, including the stairs and the entryway. The investigators left the Church at approximately 4:30 p.m.<sup>26</sup> Mr. Thompson agreed to do the cleaning, but the Church decided that it would complete it. The Church decided to hire another contractor to complete the removal of the floor tile and related clean-up.<sup>27</sup>

19. The Department sent the samples that it took at the site to Braun Intertec. The results showed that asbestos was present in the floor tile samples.<sup>28</sup>

20. Ms. La Plante discussed the results of the investigation and likely violations of the statutes and rules governing asbestos-related work with her colleagues at MDH.<sup>29</sup> On October 31, 2008, the Department notified the Respondent that it had determined that he had violated specified provisions of the statutes and rules governing

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<sup>21</sup> Ex. 4; Test. of La Plante; Test. of Thompson.

<sup>22</sup> Test. of La Plante.

<sup>23</sup> Ex. 4; Ex. 6; Test. of La Plante.

<sup>24</sup> Test. of La Plante.

<sup>25</sup> Ex. 4; Test. of La Plante; Test of Thompson.

<sup>26</sup> Ex. 4.

<sup>27</sup> Ex. 4; Test. of La Plante; Test. of Thompson.

<sup>28</sup> Ex. 8.

<sup>29</sup> Test. of La Plante.

asbestos.<sup>30</sup> The Respondent responded, challenging the bases for the alleged violations.<sup>31</sup>

21. On January 9, 2009, the Department convened an enforcement forum to review each of the alleged violations and to determine an appropriate penalty.<sup>32</sup>

22. In determining the amount of the penalty for each violation, the Department followed the process set forth in its “Plan for the Use of Administrative Penalty, Cease and Desist Authority, and other Division-wide Enforcement Tools” (Enforcement Plan).<sup>33</sup>

23. The penalty calculation takes into account the willfulness of the violation, its gravity, the history of past violations, the number of violations, the economic benefit gained by the party, and “other factors as justice may require.”<sup>34</sup> A violation that is neither “serious” nor “repeated” is considered a “forgivable” violation. For these violations, the regulated party must demonstrate in writing that the violation has been corrected without 31 days of receiving the APO. If corrected, the penalty for “forgivable” violations will be forgiven.<sup>35</sup>

24. A “nonforgivable” penalty must be paid for serious or repeated violations, regardless of whether the corrective action is performed.<sup>36</sup>

25. Exhibit 11 identifies each of the 12 violations, the forum’s determination of whether the violation was “serious” and repeated, and whether the penalty was “forgivable.” Next, the forum calculated the base penalty by evaluating, for each violation, the potential for harm and the level of deviation from the standard. After the base penalty was calculated, it was adjusted so that the combined penalty for “forgivable” and “nonforgivable” violations did not exceed \$10,000.<sup>37</sup>

26. Written notice must be given to the commissioner of an asbestos-related work project by the license holder at least five calendar days before the project begins.<sup>38</sup> The Respondent did not give notice of the project to the Department before commencing work. The Department considered this a serious violation because failure to give notice does not assure that the Department is aware of the asbestos-related work, has an opportunity to review the plan, to inspect the site and to assure that the

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<sup>30</sup> Ex. 9.

<sup>31</sup> Ex. 10. The date that the Department received the response is not clear on the copy of the document entered into evidence, but Ms. La Plante testified that the Department received it on December 8, 2008, and that the Department had treated the response as timely.

<sup>32</sup> Ex. 11.

<sup>33</sup> Ex. 15, esp. at 10-18 and A-11-12.

<sup>34</sup> Ex. 15 at 11.

<sup>35</sup> Ex. 15 at 12.

<sup>36</sup> Ex. 15 at 14.

<sup>37</sup> Ex. 11.

<sup>38</sup> Minn. Stat. § 326.74.

work will be done safely by certified workers in a manner consistent with the rules. Because the violation was serious, it was designated as nonforgivable.<sup>39</sup>

27. Five calendar days prior to beginning asbestos-related work, the license holder must pay a project permit fee to the commissioner equal to one percent of the total cost of the asbestos-related work.<sup>40</sup> The Respondent did not pay the project permit fee prior to commencing the project. The Department did not consider the violation to be serious because the failure to pay the fee did not directly affect public health or safety. Because the violation was neither serious nor repeated, it was designated as forgivable.<sup>41</sup>

28. An asbestos contractor must employ only asbestos workers and site supervisors with current certificates issued by the commissioner to do asbestos-related work.<sup>42</sup> An asbestos contractor must ensure that a certified asbestos site supervisor is present at the work site at all times when asbestos-related work is performed.<sup>43</sup> Certification assures that persons doing asbestos-related work have been properly trained.<sup>44</sup> The Respondent was unable to identify the names of the employees at the work site or to produce the certificates for those employees. The Department considered this a serious violation because of the danger to the workers and to the public of using untrained workers to do asbestos-related work. Because the violation was serious, it was designated as nonforgivable.<sup>45</sup>

29. An asbestos contractor performing abatement must ensure that certain records, including a daily sign-in and sign-out log identifying the individuals entering a containment area, are readily available for review at the work site during the entire period of the project.<sup>46</sup> The Respondent was unable to produce a sign-in and sign-out log for August 14 and 15, 2007. The Department did not consider the violation to be serious because the failure to maintain the log did not directly affect the health of the workers or public health and safety. Because the violation was neither serious nor repeated, it was designated as forgivable.<sup>47</sup>

30. An asbestos contractor performing abatement must ensure that a copy of the asbestos project plan, developed according to Minn. R. 4620.3560, is available for review at the work site during the entire period of the project, and that the records are retained by the asbestos contractor for 30 years after completion of the project.<sup>48</sup> The Respondent did not have a project plan. The Department did not consider the violation to be serious because the failure to have the plan did not directly affect the health of the

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<sup>39</sup> Test. of La Plante; Ex. 11 at 2; Ex. 15 at A-11.

<sup>40</sup> Minn. Stat. § 326.75, subd. 3; Minn. R. 4620.3430, subp. 2.

<sup>41</sup> Test. of La Plante; Ex. 11 at 2; Ex. 15 at A-11, A-12.

<sup>42</sup> Minn. R. 4620.3250, subp. 1.

<sup>43</sup> Minn. R. 4620.3250, subp. 2.

<sup>44</sup> *Id.*; Test. of LaPlante.

<sup>45</sup> Test. of La Plante; Ex. 11 at 2; Ex. 15 at A-11.

<sup>46</sup> Minn. R. 4620.3440, subp. 1 A.

<sup>47</sup> Test. of La Plante; Ex. 11 at 3.

<sup>48</sup> Minn. R. 4620.3440, subp. 1 B and subp. 2.

workers or public health and safety. Because the violation was neither serious nor repeated, it was designated as forgivable.<sup>49</sup>

31. An area must be constructed to separate and isolate the area where asbestos-related work is done from the rest of the building and the outdoors. The containment must be airtight and leak-proof.<sup>50</sup> The Respondent failed to separate and isolate the area where the asbestos-related work was done from the rest of the Church, either prior to commencing work or after learning that workers had cut the floor tile. The Department considered the violation to be serious because failure to contain the area allows the asbestos fibers and dust to move from the work area to other areas where the public may come in contact with them. Because the violation was serious, it was designated as nonforgivable.<sup>51</sup>

32. All openings between the containment area and the uncontaminated areas must be sealed with a “critical barrier,” “at least one layer of six-mil polyethylene plastic sheeting securely fastened to achieve an airtight seal around the opening.”<sup>52</sup> The Respondent failed to construct a critical barrier, either prior to commencing work or after learning that the workers had cut the floor tile. The Department considered the violation to be serious because failure to construct the barrier allows the asbestos fibers to move from the work area to other areas where the public may come in contact with them. Separation also protects objects that are porous or difficult to decontaminate. Because the violation was serious, it was designated as nonforgivable.<sup>53</sup>

33. A decontamination unit must be established contiguous with the containment area. It must have a series of connecting rooms, the middle room must be a shower room, and the doorways between the rooms and entrances to the unit must be protected with two overlapping sheets of polyethylene or the functional equivalent. The shower room and handling of the wastewater must also meet specified standards.<sup>54</sup> The Respondent failed to construct a decontamination unit either prior to commencing work or after learning that workers had cut the floor tile. The Department considered the violation to be serious because failure to install and use a decontamination unit allows the asbestos fibers and dust to move from the work area to other areas where the public may come in contact with them, and places the workers at risk of exposure if they cannot leave the work area safely after removing protective clothing and showering. Because the violation was serious, it was designated as nonforgivable.<sup>55</sup>

34. The containment must have a HEPA-filter equipped ventilation system, meeting certain specifications. It must operate continuously from the time of asbestos disturbance until results of analysis of the clearance samples indicate the air inside the containment is at or below the applicable clearance standard. The system must

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<sup>49</sup> Test. of La Plante; Ex. 11 at 3.

<sup>50</sup> Minn. R. 4620.3568, subp. 1.

<sup>51</sup> Test. of La Plante; Ex. 11 at 3-4, 7; Ex. 15 at 42.

<sup>52</sup> Minn. R. 4620.3567.

<sup>53</sup> Test. of La Plante; Ex. 11 at 3, 6; Ex. 15 at A-12.

<sup>54</sup> Minn. R. 4620.3569.

<sup>55</sup> Test. of La Plante; Ex. 11 at 4, 7; Ex. 15 at A-12.



exhaust filtered air to the outside of the facility or monitoring of the exhaust.<sup>56</sup> The Respondent failed to install a HEPA-filter equipped ventilation unit either prior to commencing work or after learning that the workers had cut the floor tile. The Department considered the violation to be serious because failure to install and use a HEPA-filter equipped ventilation system allows the asbestos fibers and dust to move from the work area to other areas where the public may come in contact with them, and places the workers at risk of exposure to asbestos. Because the violation was serious, it was designated as nonforgivable.<sup>57</sup>

35. Before and during asbestos-related work, water to which a surfactant has been added must be used to prevent fibers from becoming airborne. All asbestos-containing material must be wet before and during removal, and placed and sealed in containers while adequately wet and not allowed to dry.<sup>58</sup> The Respondent failed to wet the floor tile prior to commencing work or after learning that the workers had cut the floor tile. The Department considered the violation to be serious because failure to wet the floor tile allows the asbestos fibers and dust to move from the work area to other areas where the public may come in contact with them, and places the workers at risk of exposure to asbestos. Because the violation was serious, it was designated as nonforgivable.<sup>59</sup>

36. When an object covered with asbestos-containing material is removed from the work area, it must be removed intact or in large sections, wet before being sealed in six-mil clear polyethylene sheeting or comparable material, and wet during removal of the object.<sup>60</sup> The Respondent failed to wet, cover and seal the asbestos-containing material with six-mil clear polyethylene sheeting or comparable material during its removal from the Church to the truck. The Department considered the violation to be serious because failure to wet, cover and seal the floor tile prior to removing it from the work area allows the asbestos fibers and dust to move from the work area to other areas where the public may come in contact with them, and places the workers at risk of exposure to asbestos. Because the violation was serious, it was designated as nonforgivable.<sup>61</sup>

37. As part of every project involving asbestos-containing material, indoor air monitoring must be performed according to specified standards outside the containment area.<sup>62</sup> The Respondent failed to conduct indoor air monitoring from the start of the project, and did not begin the monitoring once it had been informed that the workers had cut the asbestos-containing floor tiles. Mr. Thompson did call for monitoring only after he was notified a second time that the workers had run the electric saws. The Department considered the failure to monitor the indoor air to be serious because it

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<sup>56</sup> Minn. R. 4620.3570.

<sup>57</sup> Test. of La Plante; Ex. 11 at 4, 7; Ex. 15 at A-12.

<sup>58</sup> Minn. R. 4620.3571, subp. 1.

<sup>59</sup> Test. of La Plante; Ex. 11 at 4, 7; Ex. 15 at A-12.

<sup>60</sup> Minn. R. 4620.3571, subp.2.

<sup>61</sup> Test. of La Plante; Ex. 11 at 5; Ex. 15 at A-12.

<sup>62</sup> Minn. R. 4620.3592.

assures that a contaminated area outside the work area is identified and decontaminated, and prevents asbestos exposure to members of the public.<sup>63</sup>

38. After determining each violation and whether it is forgivable or nonforgivable, the Department assigns a base penalty. The base penalty takes into account the potential for harm from the violation and the degree of deviation from compliance. A matrix is followed to determine the base penalty.<sup>64</sup> A base penalty was calculated for each of the alleged violations according to the matrix, \$500 for each of the forgivable violations and two nonforgivable violations, and \$5000 for the other seven serious violations. The total base penalty was \$1500 for the forgivable violations and \$36,000 for the nonforgivable violations, a total of \$37,500.<sup>65</sup> The base penalty may be increased for repeat violations, willfulness, number of violations, economic benefit and other factors as justice may require. The Department made no upward adjustments to the base penalty.<sup>66</sup> The total penalty for one incident is limited to \$10,000. The Department reduced the forgivable and nonforgivable portions of the penalty proportionally to \$833 for the forgivable penalties and \$9,167 for the nonforgivable penalties for a total penalty of \$10,000.<sup>67</sup>

39. Based on the results of the forum's review and penalty calculation, the Department issued an APO dated February 12, 2009, setting forth the specific rule violations, and the calculation of the forgivable and nonforgivable penalty assessments. The APO set forth four corrective actions to take to remedy the violations attached to forgivable penalties. The Respondent was directed to take the following actions within 30 days to have the forgivable penalties forgiven:

Submit a completed Notification of Asbestos Related Work form for the work completed at this site;

Submit a cashier's check or money order for one percent (1%) of the cost of the project as indicated on the completed Notification of Asbestos Related Work form....;

Sign the enclosed Statement, or a similar statement, and provide it to the manager of the Indoor Environments and Radiation Section (manager) within 30 days of receiving this order. The statement indicates that A-Abatement has read and fully understands the regulatory requirement listed above. The statement also indicates that in the future A-Abatement will comply with these regulatory requirements;

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<sup>63</sup> Test. of La Plante; Ex. 11 at 5, 8; Ex. 15 at A-12.

<sup>64</sup> Ex. 15, Appendix C.

<sup>65</sup> Ex. 11 at 5-8.

<sup>66</sup> Ex. 11 at 9; Test. of La Plante.

<sup>67</sup> Ex. 11 at 9-10; Test. of La Plante. See also Ex. 15 at 17.

Provide the names, addresses, phone numbers and asbestos certification numbers for all individuals working within the regulated work area on August 14 and 15, 2007.<sup>68</sup>

40. The APO also notified the Respondent of its right to request a hearing to contest the APO.<sup>69</sup>

41. By letter dated March 26, 2009, the Respondent requested a hearing to challenge the APO,<sup>70</sup> and this proceeding was commenced. None of the corrective actions were taken.<sup>71</sup>

42. In his defense, Mr. Thompson asserted that he did not anticipate that the work done at the Church would be regulated work because he had told the workers to remove the floor tile before using the electric saws to cut through the wooden subflooring. Thus, the floor tiles would not become friable and would not be subject to regulation. Because of this plan, he did not seek a permit, pay the applicable fee or file a work plan. Moreover, because he did not anticipate that regulated work would be done at the site, none of the precautions, such as containment, a decontamination unit, work space monitoring, installation of the HEPA filter, maintenance of the sign in/out log and so forth were required. Once he learned that the electric saws had been used, he stopped the work on the site, and the Church terminated his contract. Since no additional work was performed, he asserted that it was not possible for him to complete the corrective actions necessary for the forgivable portion of the penalty to be forgiven.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Department and the Administrative Law Judge have jurisdiction to consider the APO.<sup>72</sup>

2. The Respondent received due, proper and timely notice of the time and place of the hearing and the basis for the APO. This matter is properly before the Department and the Administrative Law Judge.

3. The Department has complied with all relevant substantive and procedural legal requirements.

4. The burden of proof is on the Department to demonstrate by a preponderance of the evidence that the alleged violations occurred.

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<sup>68</sup> Ex. 12 at 4-5.

<sup>69</sup> Ex. 12.

<sup>70</sup> Ex. 13.

<sup>71</sup> Test. of La Plante; Test. of Thompson.

<sup>72</sup> Minn. Stat. §§ 144.991, 14.50.

5. A person intending to perform or cause to perform any asbestos-related work must have a license from the commissioner of health.<sup>73</sup> The Respondent held a license to perform asbestos-related work.

6. Before an individual performs asbestos-related work, the individual must obtain a certificate from the commissioner certifying that the individual is qualified to perform the work. The individual must show evidence of training or experience, take a course of training in asbestos control and removal, pass an examination in those subjects, and demonstrate to the commissioner the ability to perform asbestos-related work safely. The certificate shall be carried by the individual and be readily available for inspection by the commissioner and other public officials and the contracting entity.<sup>74</sup> The Respondent had completed the necessary training and its owner, Mr. Thompson, held an asbestos site supervisor certificate.<sup>75</sup>

7. The Respondent removed floor tiles containing three percent asbestos. By using electric saws to cut the floor tiles, the floor tiles became friable material. The removal of 160 square feet or more of friable asbestos-containing material was “asbestos-related work.”<sup>76</sup> The Department demonstrated by a preponderance of the evidence that the Respondent removed 160 square feet or more of friable asbestos-containing material on August 14 and 15, 2007, and that the work done by the Respondent at the Payne Avenue Evangelical Free Church (Church) was “asbestos-related work.”

8. The Respondent failed to submit notification to MDH of regulated asbestos-related work at the Church at least five days prior to commencing work on August 14, 2007, in violation of Minn. Stat. § 326.74 and Minn. R. 4620.3410, subp. 1.

9. The Respondent failed to pay the required permit fee for regulated asbestos-related work, in violation of Minn. Stat. § 326.75, subd. 3, and Minn. R. 4620.3430, subp. 2.

10. The Respondent could not identify the workers employed at the Church or produce their certifications to do asbestos-related work. The Department proved by a preponderance of the evidence that the Respondent failed to use certified asbestos workers and site supervisors to conduct regulated asbestos-related work, in violation of Minn. R. 4620.3250, item A.

11. The Respondent was unable to produce a sign-in and sign-out log identifying individuals conducting asbestos-related work. The Department proved by a preponderance of the evidence that the Respondent failed to have a sign-in and sign-out log identifying individuals conducting regulated asbestos-related work in the sanctuary of the Church, in violation of Minn. R. 4620.3440, subp. 1 A.

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<sup>73</sup> Minn. Stat. §§ 326.72, 326.73.

<sup>74</sup> Minn. Stat. § 326.73.

<sup>75</sup> Minn. R. 4620.3310.

<sup>76</sup> Minn. Stat. § 326.71, subd. 4.

12. The Respondent failed to have a project plan for the regulated asbestos-related work at the Church, in violation of Minn. R. 4620.3440, subp. 1 B.

13. The Respondent failed to seal the openings in the work area prior to conducting regulated asbestos-related work, in violation of Minn. R. 4620.3567.

14. The Respondent failed to construct containment to isolate the work area from the rest of the building to prevent asbestos contamination of non-work areas, in violation of Minn. R. 4620.3568, subp. 1.

15. The Respondent failed to construct a decontamination unit for workers exiting the work area and to prevent contamination of areas outside the work area, in violation of Minn. R. 4620.3569, subp. 1.

16. The Respondent failed to have an operational HEPA-filtration system for the work area before conducting regulated asbestos-related work, in violation of Minn. R. 4620.3570, subp. 1.

17. The Respondent failed to wet the asbestos-containing floor tile before and during its removal from the Church, in violation of Minn. R. 4620.3571, subp. 1 A and B.

18. The Respondent failed to wrap the floor sections in six-mil polyethylene sheeting before removing the sections from the work area and stacking them in the back of Respondent's truck, in violation of Minn. R. 4620.3571, subp. 2 B.

19. The Respondent failed to conduct indoor air monitoring during regulated asbestos-related work, in violation of Minn. R. 4620.3592, subp. 2.

20. In assessing the amount of the penalty, the Department took into account the factors set forth in Minn. Stat. § 144.991, followed its penalty matrix, and applied the statutory limit of \$10,000 for all violations identified in one inspection.<sup>77</sup> The amount of the penalty is reasonable.

21. Although the Respondent did not prevail in his appeal, his request for hearing was not solely for the purposes of delay or frivolous.<sup>78</sup>

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

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<sup>77</sup> Minn. Stat. § 144.99, subd. 4 (a).

<sup>78</sup> See Minn. Stat. § 144.991, subd. 5 (e).

## **RECOMMENDATION**

The Administrative Penalty Order issued to A-Abatement & Contracting, Inc. on February 12, 2009, be AFFIRMED.

Dated: June 24, 2009

s/Beverly Jones Heydinger  
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BEVERLY JONES HEYDINGER  
Administrative Law Judge

Reported: Digitally Recorded

## **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Parties should contact Dr. Sanne Magnan, Commissioner of the Department of Health, 625 Robert Street North, PO Box 64975, St. Paul, MN 55164-0975 (651) 201-4799, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **MEMORANDUM**

Mr. Thompson acknowledged that he did not comply with the rules applicable to removal of asbestos-containing material. He asserted that he did not intend for the floor tiles to be damaged, thus becoming friable, and that absent friable material, none of the regulations applied. The Department does not claim that the removal of the floor tiles was *per se* a regulated project, but once the floor tiles were cut, it became one. It was the responsibility of the Respondent to supervise the project to assure that the workers did not create any friable material, and if they did, to stop the project immediately and notify the Department. Mr. Thompson offered credible testimony, corroborated by a Church member's statement to the Department, that he was upset to learn that the floor tiles had been cut and immediately directed the workers to stop cutting them. Nonetheless, he was responsible for their actions. And when he directed the workers to stop, apparently they began cutting again.

Once Mr. Thompson learned that the tiles had been cut, he did not install containment, critical barriers, a decontamination unit or air monitoring before allowing

his workers back into the work area. Instead, he directed the workers to remove the cut panels from the Church to his truck without taking necessary precautions, including wetting the tiles or wrapping them as the rules require. Thus, when confronted with improperly cut asbestos containing material, Mr. Thompson did not take the precautions set forth in the rules to protect the workers or protect the public. He did call Angstrom Analysis to take samples of the areas adjacent to the work area, but not until he was aware that the Department had been contacted.

Some of Mr. Thompson's statements supported the Department's claims. In particular, he admitted that he did not know the names of the workers, nor did he obtain their names from his brother. He said he had copied the asbestos site-supervisor's certificate, but he could not produce it. Based on Mr. Thompson's testimony, it is not likely that he was familiar with the workers or could reasonably rely on them to do the work correctly. Yet he did not remain at the job site to assure that his directions were followed. As a certified supervisor, he had been trained about the rules governing asbestos removal, yet he did not assure that the rules were followed. When it became clear that the work had been done improperly, he did not take steps to assure that the asbestos-containing materials were wetted or sealed to assure proper removal. Thus, even if the initial actions of the workers were in conflict with his directions, he did not take the proper steps upon learning of their mistakes.

Similarly, the Respondent's argument for failing to take the corrective actions to address the forgivable portion of the APO is not logical. Once it received the APO, the Respondent could have given the required notice and paid the fee for the portion of the work that it completed and signed the statement. Also, Mr. Thompson could have contacted his brother to obtain the names and addresses of the workers who had been on the job. Respondent was not asked to do anything as a corrective action that it could not accomplish.

The Department did not permit Angstrom Analytical to test air or dust in the area where tile was removed. Respondent contended that the testing would have shown that the area was not contaminated and that the violations for failing to contain the area, install the critical barriers and HEPA-filter ventilation system, and wetting the tiles were not supported. However, the presence or absence of the asbestos fibers in the area did not trigger the duty to take the necessary precautions. Rather it was the possibility of exposure to asbestos fibers inherent in asbestos-related work that supported the violations.

The Department followed its established protocol for evaluating each violation, assigned a base penalty, and calculated the total amount owing. Although the violations individually totaled far more than \$10,000, the Department correctly limited the fine to \$10,000 for all violations stemming from one inspection.

The Respondent's appeal was not frivolous. Mr. Thompson credibly testified that he did not expect the workers to cut the floor tile. If they had not, the project would not have met the definition of asbestos-related work and the governing statutes and

regulations would not apply. Thus, Respondent contended that it should not have been penalized for unavoidable violations. However, as the Department's investigator stated, if the Respondent had stopped all work, notified the Department, contained the work area and prevented employees and the public from re-entering, Respondent might have avoided a number of violations. Although Respondent's defense was unpersuasive, it was not frivolous.

**B. J. H.**